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IN THE

Supreme Court of the United States

October Term, 1967.

No. 908

DAUPHIN DEPOSIT TRUST COMPANY and CLEMENT FILIPPELLI, as Treasurer of Dauphin Deposit Trust Company,
Petitioners,

v.

UNITED STATES OF AMERICA and VICTOR A. FRANCHI, Special Agent, Internal Revenue Service,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.

DAUPHIN DEPOSIT TRUST COMPANY AND CLEMENT FILIPPELLI, AS TREASUBER OF DAUPHIN DEPOSIT TRUST COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA AND VICTOR A. FRANCHI, SPECIAL AGENT, INTERNAL REVENUE SERVICE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Dauphin Deposit Trust Company (a bank) and Clement Filippelli, as Treasurer of Dauphin Deposit Trust Company, Petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on October 12, 1967.

OPINIONS BELOW.

The Order of Court and supplemental Memorandum issued by the United States District Court for the Middle District of Pennsylvania are unreported, but are printed in the Record submitted with this Petition For Writ of Certiorari (R 146a and 153a). The Opinion of the United States Court of Appeals for the Third Circuit is unreported, but is attached hereto as Appendix A, *infra*, pp. 11-14.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit (Appendix B, *infra*, pp. 15-16) was entered on October 12, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether a writ of certiorari should issue where the order of the Court below, in conflict with decisions both of this Court and other Circuits, enforces Internal Revenue Summonses, notwithstanding the fact that, contrary to the specific mandate of this Court, the Internal Revenue Service has failed to show that its investigation is being conducted pursuant to a legitimate purpose and that its inquiry is relevant to that purpose and the fact that information sought in the Summonses is already within the possession of the Internal Revenue Service.

2. Whether a writ of certiorari should issue where, contrary to the usual course of judicial proceedings and in conflict with decisions both of this Court and other Circuits, the Court below issues an order against an innocent third party, so as to cost that party an amount in excess of $10,000 and cast upon said third party an unreasonable and unlawful burden subjecting said party to an unlawful deprivation of his property.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The statutory provisions involved are 26 U. S. C. §§ 6501(a), 6501(c), 7602, 7604(a) and 7605(b). Those sections are printed in Appendix C, *infra*, pp. 17-19.

The Constitutional Provisions involved are Amendment IV, of the Constitution of the United States and Amendment V, of the Constitution of the United States, printed in Appendix D, *infra*, p. 20.

STATEMENT.

On or about April 25, 1966, Special Agent, Victor A. Franchi, one of the Respondents, under purported authority of Section 7602 of the Internal Revenue Code of 1954, (26 U. S. C. 7602), issued and served three summonses upon Petitioners. Petitioners refused to comply with the summonses and Respondents, pursuant to the authority of Section 7604(a) of the Internal Revenue Code of 1954, (26 U. S. C. 7604(a)) sought enforcement of the summonses in the United States District Court for the Middle District of Pennsylvania.

The jurisdiction of the District Court was invoked because the case arises under the Internal Revenue Code of 1954, which specifically provides (26 U. S. C. § 7604(a)) that enforcement of summonses issued under Section 7602 of the Code shall be sought in the United States District Court for the District in which the person so summoned resides.

On April 25, 1966, Respondent, Victor A. Franchi, Special Agent, Internal Revenue Service, called upon the Petitioners and requested that he be furnished copies of checks and certain other items of information apparently regarding certain taxpayers whom he was investigating. An unknown quantity of the material requested by Agent Franchi already had been given to him by the taxpayers who were the subject of his investigation. It was suggested that Agent Franchi furnish Petitioners with a list of the items desired, whereupon, on the same day, Agent Franchi prepared and served the summonses which became the issue in this case (R 33a, 35a).

The summonses which were served demanded an extensive production of information (R 15a, 16a and 17a). In the Petition to Enforce Internal Revenue Summonses,

(R 3a through 17a), the Internal Revenue Service demanded even more information than requested in the summonses.

Petitioners filed and served a Motion to Quash Summonses and appeared at a hearing in the District Court. At the hearing the evidence established, inter alia, the Internal Revenue Service was seeking material already within its knowledge (R 10a, 12a), certain items (checks) requested probably were non-existent (R 29a, 30a, and 95a, 96a), certain items (treasurers' checks) requested probably could not be located because of insufficient identification (R 89a through 95a inclusive), and the records relevant to other items (special accounts) which had been demanded could not be produced because Petitioner did not know what was meant by the term (special accounts) describing the other items (R 88a).

At the hearing Petitioners presented detailed testimony concerning the time, effort and cost which would be incurred if Petitioners were required to produce the material demanded in the summonses and the enforcement petition. In addition to the burdensome nature of the production, Petitioners proved that the costs to Petitioners would be in excess of $10,000 (R 100a, 111a).

The record reveals that the instant case follows closely upon a similar case between the same parties (albeit a different Special Agent) wherein a summons substantially less broad than those herein involved was brought before the same District Court for enforcement, only to be reduced in scope by that Court (R 26a, 27a, 28a, 29a). The evidence further shows that Petitioners previously have cooperated with the Internal Revenue Service in regard to summonses, but have now sought to have the summonses restricted because of the unreasonable burden placed upon Petitioners by the continuing issuance of such summonses (R 119a, 120a and 122a, 123a).

On August 24, 1966, the District Court issued an Order directing Petitioners to make available the items demanded in the three summonses and in the Petition to enforce said summonses.

On September 23, 1966, Petitioners filed an appeal with the United States Court of Appeals for the Third Circuit and were granted a supersedeas (R 147a, 148a, 149a).

On December 8, 1966, the District Court filed a Memorandum in support of its Order of August 24, 1966 (R 152a).

On October 12, 1967, after argument, the United States Court of Appeals for the Third Circuit issued its Judgment (Appendix B, *infra*, pp. 15-16) and Opinion (Appendix A, *infra*, pp. 11-14). Said Judgment and Opinion modified slightly and enforced the order of the District Court.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court below in the instant case is in conflict with the specific language of this Court as stated in a case concerning the same section of the Internal Revenue Code and arising from the same Circuit. In that case, *United States v. Powell,* 379 U. S. 48 (1964), this Court said that the Internal Revenue Service, in conducting investigations under the Section of the Internal Revenue Code involved in this case (26 U. S. C. § 7602):

> ". . . must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession. . . ." (*Id.* at 57, 58)

Petitioners showed both at hearing and upon appeal that a large segment of the investigation is not being conducted pursuant to a legitimate purpose because the statute of limitations as to the calendar years 1961 and 1962 has expired (26 U. S. C. § 6501(a)), and the Internal Revenue Service has not brought itself within an exception permitting it to treat those years as "open" years. The Internal Revenue Service, more particularly, has failed to allege or indicate, suspicion of fraud, agreement or other ground for extension of the period of the statute of limitations (26 U. S. C. § 6501(c)).

The Internal Revenue Service has failed to show that the information demanded is relevant to the purpose of a legitimate investigation. Rather, the demand was simply that the Court placed its approval as a "rubber stamp" upon the summonses as issued. As pointed out in *Local 174, I. B. T. v. United States,* 240 F. 2d 7 (9th Cir. 1956), the Internal Revenue Service must show relevancy in seeking enforcement of its summonses. This position appears to be adopted in *Powell, supra.*

Contrary to the language in *Powell, supra,* the Internal Revenue Service not only failed to show that it did not have the information sought, but, to the contrary, conclusively proved, through its own Special Agent, that it did have the original copies of information which it had obtained from the taxpayer (R 32a, 33a and 35a). Not only did it have information it was seeking, but the Internal Revenue Service, in fact, had the best evidence. Petitioners, if they have anything, could at most have only copies of the original documents, whereas the original documents themselves were either in the possession of the taxpayer or the Internal Revenue Service and had been examined by the latter.

2. The decision of the United States Court of Appeals for the Third Circuit in this case is in conflict with the decisions in this area of the law in other Circuits of the United States.

This Court, in *Powell, supra,* observed that the differing views in the Circuits on the standards which the Internal Revenue Service must meet to obtain judicial enforcement of its orders had caused this Court to grant certiorari in that case. Once again, conflict arises in an area which is vital to correct interpretation and enforcement of the Internal Revenue Code. In *United States v. First National Bank of Fort Smith, Arkansas,* 173 F. Supp. 716 (W. D. Ark., 1959), a case similar in facts to the instant case, the Bank, as does the petitioning bank here, argued that the demands contained in the summonses violated the constitutional protection against unreasonable search and seizure and also constituted an attempt by the Internal Revenue Service to cast a burden on the bank so unreasonable as to constitute a deprivation of property without due process of law. The Court in *First National* denied enforcement of a summons which was substantially the

same as those which the court below seeks to enforce in this case. It is submitted that had the instant case found its venue in the *First National* court, the result below would have been opposite to that which has obtained.

On page three of its Opinion (Appendix A, *infra*, p. 13) the Court below, in attempting to mitigate Petitioners' burdens, stated that Petitioners would not be breaching their duty to their customers by permitting the Internal Revenue Agents to have access to their files. In *United States of America v. Third Northwestern National Bank*, 102 F. Supp. 879, appeal dismissed 196 F. 2d 501 (1952), the Court, on that very point, stated that the bank should not be required to give the Internal Revenue Agents the access held appropriate by the Court below.

As pointed out above in *Local 174, supra*, the Ninth Circuit requires the Internal Revenue Service not only to prove the relevancy of material sought, but that Circuit additionally seems to require that the Service prove that the object of the summons has possession of the materials sought. Neither relevancy nor possession were proved in this case, but enforcement, nonetheless, was ordered.

In the case below it developed at trial that the Internal Revenue Service was seeking to have Petitioners produce copies of checks which did not, in fact, exist (R 29a, 30a and 95a, 96a). Nonetheless, the petition seeking production of non-existent checks was enforced by the Court below without modification. The United States Court of Appeals for the Fifth Circuit, in conflict with this procedure has stated:

> ". . . the agent must specify with sufficient precision for identification the documents desired to be inspected." *First National Bank of Mobile v. U. S.*, 160 F. 2d 532 at 534; 1947.

This clearly conflicts with the result below.

3. This area of the law is vitally important because it affects every bank and other similar institution in the United States. Further, the law of this case is crucial in administering the summons provisions of the Internal Revenue Code. The Court below has departed from the usual course of judicial procedure, and this Court should exercise its power of supervision and afford general guidelines which would be applicable in situations such as the instant case.

As can be seen in reviewing the summonses, Petitioners, innocent third parties and not taxpayers being investigated, are required to produce vast quantities of information for the use of the Internal Revenue Service. All of this production is required at Petitioners' own cost and expense and is unreimbursed by even so little as a witness fee. As previously has been observed by this Court:

> "We are also of the opinion that an order for the production of books and papers may constitute an reasonable search and seizure within that Fourth Amendment." *Hale v. Henkel,* 201 U. S. 43 at 76; 1905.

As the uncontradicted evidence demonstrates, *production* of the material as ordered below *will cost at least $10,000*; this is *a cost imposed upon an innocent third party* which has done nothing wrong. Moreover, since the Service already has an undetermined quantity of the information, the examination is unnecessary and, therefore, unauthorized. (26 U. S. C. § 7605(b).)

In addition to being an unlawful search and seizure within the meaning of the Fourth Amendment, as noted above, the investigation constitutes a taking of Petitioners' property in violation of the Fifth Amendment of the United States Constitution. This is an injustice which is being increasingly repeated and from which the innocent taxpayer must have protection.

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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PAUL H. RHOADS,
Attorneys for Petitioners.

RHOADS, SINON & READER,
Of Counsel.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16241

UNITED STATES OF AMERICA AND VICTOR A. FRANCHI, SPECIAL AGENT, INTERNAL REVENUE SERVICE,
Appellees

v.

DAUPHIN DEPOSIT TRUST COMPANY, AND CLEMENT FILIPPELLI, AS TREASURER OF DAUPHIN DEPOSIT TRUST COMPANY,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued April 21, 1967

Before SMITH and FREEDMAN, *Circuit Judges*, and WORTENDYKE, *District Judge*

Opinion of the Court.

(Filed October 12, 1967)

By SMITH, *Circuit Judge.*

This appeal is from an order of the district court enforcing three summonses issued by the Internal Revenue Service pursuant to section 7602 of the Internal Reve-

nue Code of 1954, 28 U. S. C. A., as limited and restricted by the affidavit and exhibits attached to the Government's Petition to Enforce.[1] The summonses required the respondent bank to produce numerous records regarding the transactions of four purported customers over a period of four years. The bank has refused to comply at all times. It has not even confirmed whether the persons named in the summonses actually are bank customers.

Appellant has advanced many arguments, both legal and otherwise, as to why these summonses, as limited, should not be enforced. The first group of arguments charges that the summonses do not meet the requirements stated in *United States v. Powell,* 379 U. S. 48, 57-58 (1964) in that the material sought was already in the Government's possession and was not relevant to an investigation "conducted pursuant to a legitimate purpose." We find these contentions to be without merit.

Appellant's primary argument is that the summonses are so expansive that the financial burden of locating, retrieving, and reproducing the requested material amounts to an unreasonable search and seizure in violation of the Fourth Amendment and a deprivation of property without due process of law in violation of the Fifth Amendment. The substance of appellant's Fifth Amendment claim appears to be that the financial burden constitutes a taking of private property without just compensation.

We have already concluded that the material sought by the Internal Revenue Service is relevant to a lawful investigation. Under this circumstance there can be no doubt that the recipient of a summons has a duty of co-

1. The original summonses were admitted evidence in the court below as Exhibits "B", "C", and "D". The material now required to be produced is itemized in Exhibits "A-1", "A-2", and "A-3" to Exhibit "A" below. These Exhibits were attached to the Government's Petition to enforce and substantially limited the quantity of material sought.

operation and that at least up to some point must shoulder the financial burden of cooperation. Our study of the record convinces us that the district court was correct in concluding that the appellant was not requested to submit to an unreasonable burden. If the Fourth and Fifth Amendments accord any protection it could only be from the imposition of an unreasonable and excessive financial burden.

The Petition to Enforce substantially reduced the quantum of material requested in the original summonses. It is our judgment that compliance with this reduced demand would not be unduly burdensome. Furthermore, in view of appellant's adamant refusals to cooperate with the Government in the slightest degree its arguments as to the extent of the burden become plainly speculative. Appellant has not even verified whether the taxpayers in question are in fact customers. Yet it persists in arguing that in locating the required materials it *might* be necessary to conduct extensive searches in eighteen offices. A simple check of signature cards would have removed this contention from the realm of the merely possible.

Our determination that the summonses would not be unduly burdensome is buttressed by the fact that the bank is not required to transport any records and may fulfill its obligation either by producing the required records at any of its offices or by giving Internal Revenue Agents access to the relevant files.[2] It is our further understanding, based on statements made by Government counsel at oral argument, that the Internal Revenue Service has portable duplicating equipment, the use of which will limit the bank's burden of making copies of its records.

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2. Because of the extent of the Internal Revenue Service's requests we do not feel that appellant would be breaching a duty to its other customers by selecting the latter alternative. By the same token a high duty would be placed on the Service to respect the integrity of appellant's files.

One other matter should be considered. The Government is not entitled to go on a fishing expedition through appellant's records. It must identify with some precision the documents it wishes to inspect. *First National Bank of Mobile v. United States*, 160 F. 2d 532, 534 (5th Cir. 1947); *United States v. First National Bank of Fort Smith, Ark.*, 173 F. Supp. 716, 720 (W. D. Arkansas 1959). The requirement that the summons not be indefinite is rooted in the Fourth Amendment protection against unreasonable searches and seizures. See *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186, 208-209 (1946); *United States v. Morton Salt Co.*, 338 U. S. 632, 652-653 (1950).

It is our judgment that the summonses, as limited by the Petition to Enforce, are, with one exception, not unduly indefinite. The exception pertains to the demand made as to each alleged bank customer that the appellant produce, "All records relative to other accounts during the years 1961 through 1964, such as records of other securities bought or sold for said . . . . [customer(s)] or other transactions of any nature handled by the bank on behalf of said . . . [customer(s)]."[3] The request for "records of other securities bought or sold" is sufficiently precise. The balance of the request is too indefinite and will be quashed.

We also take this opportunity to note that in regard to the other demands made on the bank its only obligation is to make a diligent search based on the information supplied by the Internal Revenue Service. If that information is inaccurate or otherwise insufficient to enable it to locate the desired records, the bank of course may not be found at fault.

The order of the district court will be affirmed as modified by this opinion.

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3. This statement is found in the following paragraphs of Exhibit "A-1" to Exhibit "A": I, 9; II, 3; III, 6.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16241

UNITED STATES OF AMERICA, AND VICTOR A. FRANCHI, SPECIAL AGENT, INTERNAL REVENUE SERVICE

v.

DAUPHIN DEPOSIT TRUST COMPANY AND CLEMENT FILIPPELLI, AS TREASURER OF DAUPHIN DEPOSIT TRUST COMPANY,

Appellants

(D. C. Civil Action No. 9497)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: SMITH and FREEDMAN, *Circuit Judges*, and WORTENDYKE, *District Judge*.

Judgment.

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 24, 1966, be, and the same is hereby affirmed as modified by the opinion of this Court, with costs to appellee.

Attest: THOMAS F. QUINN,
Clerk.

October 12, 1967

APPENDIX C.

Statutes Involved.

26 U. S. C. § 6501(a)

(a) *General rule.*—Except as otherwise provided in this section the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

26 U. S. C. § 6501(c)

EXCEPTIONS.—

(1) *False return.*—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) *Willful attempt to evade tax.*—In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(3) *No return.*—In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(4) *Extension by agreement.*—Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary or his delegate and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

26 U. S. C. § 7602

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

26 U. S. C. § 7604(a)

(a) *Jurisdiction of district court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

26 U. S. C. § 7605(b)

(b) *Restrictions on examination of taxpayer.*—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

APPENDIX D.

Constitutional Provisions Involved.

AMENDMENT IV—SEARCHES AND SEIZURES.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.